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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 323

INSULAR SUGAR REFINING CORPORATION, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and opinion of the Tax Court (R. 29–39) are reported in 3 T. C. 922. The opinion and dissenting opinion of the Circuit Court of Appeals (R. 142–149) are unreported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 27, 1945 (R. 149–150). The petition for a writ of certiorari was filed on August 14, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Was the taxpayer subject to the unjust enrichment tax imposed by Section 501 (a) (2) of the Revenue Act of 1936 on the amount of $6,358.68 reimbursed to it by its vendor during the fiscal years ended November 30, 1935, and November 30, 1936, on account of processing tax included in the price of cotton bags purchased by the taxpayer where the taxpayer failed to prove that it bore the burden of the tax?

2. Is the taxpayer exempt from the unjust enrichment tax under the provisions of Section 501 (b) of the Revenue Act of 1936?

STATUTE AND REGULATIONS INVOLVED

The applicable provisions of the statute and regulations are set out in the Appendix, *infra*, pp. 13–15.

STATEMENT

The facts as found by the Tax Court (R. 30–33) may be summarized as follows:

This proceeding involves deficiencies in unjust enrichment tax for the taxable fiscal years ended November 30, 1935, and November 30, 1936 (R. 29).

The taxpayer, referred to as Insular, is a corporation, organized under the laws of the Philippine Islands with its principal office in Manila, and is engaged in refining sugar. During the years in question it was a subsidiary of the International Sugar Corporation, a New York cor-

poration, referred to as "Suchar." The taxpayer's Pacific Coast agent in this country was Balfour, Guthrie & Company, Ltd., called "Balfour." (R. 30.)

In keeping with trade custom, the taxpayer's sugar was packed and sold in containers holding 100 pounds of sugar each.[1] About 90 percent of it was exported to the United States and sold by Balfour. The balance was sold in the Philippines. The containers used were purchased in the United States by Suchar for the taxpayer's account or through Balfour. They were exported to the taxpayer and all but those used in the Philippine trade were filled with sugar and subsequently exported. During the periods here involved, Balfour, acting as purchasing agent for the taxpayer, ordered various amounts of bags from Pacific Diamond H Bag Company, called "Diamond." Diamond shipped the bags to the taxpayer at Manila prior to January 6, 1936, and appeared as consignor in the shipping papers. The prices charged taxpayer for such bags included cotton processing taxes totalling

[1] An export container consisted either of a burlap bag with a cotton liner or a burlap bale containing ten to twenty small cotton bags called "pockets." The containers used in the Philippine trade were single large cotton bags. The cost of the bags fluctuated but averaged, less tax, about 12 cents each for the single large bags, 14 cents for burlap bags with cotton liners and 24 cents or 29 cents for the bales of pockets. The sales price of sugar also fluctuated but not in relation to price changes in bags. (R.31.)

$6,358.68 which Diamond had borne. Coincident with the issuing of invoices covering the several purchases, credit memoranda were made and sent to taxpayer showing the amount of refund which would be payable to taxpayer as and when the tax was refunded to Diamond by the Government.[2] (R. 31.)

Claims for refund of the cotton processing tax were filed by Diamond and allowed in the sum of $6,358.68 and reimbursement thereof was made by Diamond to the taxpayer. The taxpayer incurred no expense in connection with these reimbursements. (R. 32.) The cotton processing tax went into effect on August 1, 1933. The tax amounted to about nine-tenths of a cent on a large bag and two and two-tenths cents on a bale of pockets. The taxpayer's sale price was increased from $4.50 to $4.60 per 100 pounds of sugar on August 1, 1933. (R. 32.) When shipments of bags were made to it, the taxpayer set up a debit memorandum on its books in the approximate amount of

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[2] This was pursuant to a circular letter mailed on June 25, 1934, by Diamond to its customers stating that all its bills and contracts would carry the following clause (R. 32):

"Cost of cotton cloth, of which bags herein invoiced (sold) are composed, includes processing tax paid by manufacturer of said cloth. In the event it is determined that on any bags herein referred to, seller is entitled to refund of all or any part of such tax, and when and if payment of such refund is received by seller, the amount of such payment received will be remitted to the buyer."

the tax included in the price of the bags. This item was treated as an asset and was cancelled when the reimbursement was received. Neither taxpayer nor Suchar instructed Balfour to add the cotton processing tax to the sales price of sugar. (R. 33.)

The Commissioner held that unjust enrichment taxes were due under the provisions of Section 501 (a) (2) of the Revenue Act of 1936, upon the reimbursements received by the taxpayer from Diamond on account of cotton processing taxes (R. 29). The Tax Court sustained the action of the Commissioner (R. 40) and the Circuit Court of Appeals affirmed (R. 149),[3] one judge dissenting (R. 147–149).

ARGUMENT

1. By Section 501 (a) (2) (Appendix, *infra*, p. 13) of Title III of the Revenue Act of 1936 Congress imposed an unjust enrichment tax equal to 80 percent of the net income from reimbursement received by a vendee from his vendor of amounts representing the federal excise tax burden included in the price paid by the vendee to his vendor to the extent that the vendee shifted the tax burden to others in any manner.

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[3] The case was remanded to the Tax Court to determine the exact amount of reimbursement received in the fiscal years ending November 30, 1935, and November 30, 1936, respectively (R. 146–147).

The primary purpose of the Act[4] was to tax profits realized in the form of a refund of processing taxes (as a result of the decision in *United States* v. *Butler*, 297 U. S. 1, declaring the Agricultural Adjustment Act, c. 25, 48 Stat. 31, as amended, unconstitutional) in cases where the taxpayer had shifted or passed the tax on to its vendees.

Insular admittedly received reimbursement of $6,358.68 from its vendor, Diamond, representing cotton processing tax paid by Insular to Diamond which had been included in the price of cotton bags purchased by Insular from Diamond. The Tax Court held (R. 36–39) that Insular failed to establish it bore the burden of the tax and had not shifted it to sugar purchasers. The evidence showed (R. 32, 37) on the date the cotton processing tax went into effect, August 1, 1933, the taxpayer raised the price of its sugar 10 cents per

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[4] H. Rep. No. 2475, 74th Cong., 2d Sess., p. 11 (1939–1 Cum. Bull. (Part 2) 667, 675) states:

"Where the taxpayer is a person who bought articles at a price including the burden of the excise and resold them at a price also including the burden of the excise, there shall be computed the net income attributable to any reimbursement he receives from his vendor for the burden of the excise, and this amount (limited by the extent to which he shifted the burden of the excise to his customers) is subject to the tax."

See also S. Rep. No. 2156, 74th Cong., 2d Sess., pp. 24–27 (1939–1 Cum. Bull. (Part 2) 678, 694–696).

100 pounds, which was sufficient to pass on the burden of the tax and more.[5] The question of whether or not the tax burden had been shifted was one of fact for determination of the Tax Court, and the Circuit Court of Appeals (R. 146) accepted the Tax Court's finding as binding.

On this record Insular has failed completely to establish that it bore the burden of the cotton processing tax, and since it has received reimbursement from its vendor for the taxes paid by it, it is liable for the unjust enrichment tax imposed by Section 501 (a) (2) of the Revenue Act of 1936.

2. To avoid the unjust enrichment tax Insular claims exemption under Section 501 (b) (3) of the Revenue Act of 1936 (Appendix, *infra,* pp. 13–14) and necessarily relies upon Section 17 (a) of the Agricultural Adjustment Act, as amended by the Act of August 24, 1935, c. 641, 49 Stat. 750, Section 28, and as reenacted by Section 601 (a) of the Revenue Act of 1936 for the limited purpose of allowing refunds thereunder where the exportation, as here, took place prior to January 6, 1936. *Wilson & Co.* v. *United States,*

[5] Unjust enrichment tax returns on Form 945 for the years ended November 30, 1935, and November 30, 1936, were filed with the Collector but these returns did not contain marginal computations permitted by Section 501 (e) of the Revenue Act of 1936 (Appendix, *infra,* pp. 14–15) to establish presumptions as to the shifting of the tax burden to others (R. 30–31).

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311 U. S. 104. The statute reads, in part, as follows:

> SEC. 17 (a). Upon the exportation * * * to the Philippine Islands * * * of any product processed wholly or partly from a commodity with respect to which product or commodity a tax has been paid * * * under this title, the tax * * * due and paid shall be * * * refunded. Under regulations prescribed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, the credit or refund shall be allowed to the consignor named in the bill of lading under which the product is exported or to the shipper or to the person liable for the tax provided the consignor waives any claim thereto in favor of such shipper or person liable for the tax. * * * (7 U. S. C., Sec. 617.)

It will be observed that the statute states in specific and unequivocal terms that the refund upon exportation of the taxed article is to be allowed (1) to the consignor or, (2) if the consignor waives his claim in favor of the shipper, to the shipper or (3) if the consignor waives his claim in favor of the person liable for the tax, to such person.

The Tax Court (R. 36) and the Circuit Court of Appeals (R. 144–146) held that Insular was not one who could claim a refund under Section 17 (a) of the Agricultural Adjustment Act. It was not the consignor under the shipping papers

but was the consignee. Insular urges (Pet. 11–12) that it was the shipper on the ground that the bags had been appropriated to its use prior to their exportation. But here again Diamond was the actual shipper. Even assuming *arguendo* that Insular was the shipper, there is still no showing that Diamond waived its claim for refund in its favor as required by the express terms of the statute. In fact Diamond itself claimed and obtained the refund from the Government. Thus Insular was not entitled to a refund under the specific terms of the statute and the exemption provided for in Section 501 (b) is not available to it.

Treasury Regulations[6] relied upon by Insular (Pet. 11) merely confirm the Government's position that the consignor is the person entitled in the first instance to file a claim for refund. He may waive that right in favor of the shipper but until he does so his right to the refund is paramount. But there was no such waiver in the instant case, for Diamond filed the claim and received the refund from the Government. Diamond was not Insular's agent. There is no proof that it was handling the bags for the taxpayer. It was selling bags to Insular through Insular's agent, Balfour.

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[6] Article 3, Regulations 83, as amended by T. D. 4671, XV–2 Cum. Bull. 424, 427 (1936). (See Appendix, *infra*, p. 15.)

In short, Insular was neither consignor nor shipper and cannot bring its case within the purview of the exemption statute.

3. There is no conflict of decisions as asserted by the taxpayer (Pet. 2). The repeated characterization by Insular of this reimbursement to it of cotton processing taxes by the vendor, Diamond, as a "drawback" is a misnomer and erroneous.

Thus *Campbell* v. *United States,* 107 U. S. 407, 411, is not in point. That case held that a person entitled by statute to a drawback may, after payment is refused by the Treasury, maintain a suit in the Court of Claims on the basis of an implied contract. But even if that case were applied to the facts of the instant case, any implied contract to repay was between Diamond, the exporter, and the Government and not between Insular and the Government. Moreover, subsequent to the *Campbell* case, it has been made plain that an export refund is not a contract right but a gratuity. *Swan & Finch Co.* v. *United States,* 190 U. S. 143, 146; *cf. United States* v. *Allen,* 163 U. S. 499.

The case of *Cudahy Bros. Co.* v. *La Budde,* 92 F. 2d 937 (C. C. A. 7th),[7] certiorari denied, 303 U. S. 659, does not deal with a question arising under Section 501 (b) of the Revenue Act of

[7] It should be noted that the *Cudahy* decision is doubtful authority in view of *Wilson & Co.* v. *United States,* 311 U. S. 104.

1936 (cf. Pet. 2, 8–9). The plaintiff there was the processor, consignor and exporter of the exported articles and the issue was whether it could recover the export refund without complying with the requirements of Title VII of the Revenue Act of 1936 relating to the refund of amounts collected under the Agricultural Adjustment Act. As pointed out above, Insular was neither the processor, consignor nor exporter. It was merely a purchaser of cotton bags to the price of which the vendor, Diamond, had added the processing tax and on refund being made to Diamond, it, in turn, reimbursed Insular.

The taxpayer relied below upon the decision in *Helvering* v. *Insular Sugar Refining Corp.*, 141 F. 2d 713 (App. D. C.), and urged that since the court there held the taxpayer absorbed $.2244 per bag of the processing tax on sugar sold, it must also have absorbed the cotton processing tax on bags (Br. 15). That conclusion by no means follows and the decision is not *res judicata* of the question here because the tax on sugar and on cotton are separate and distinct taxes. That case cannot supplement the proof in the instant case since the Tax Court has found the taxpayer failed to prove that the cotton processing tax on bags was not shifted to its customers (R. 32, 37–39). *Cf. Insular Sugar Refining Corp.* v. *United States*, 49 F. Supp. 319 (C. Cls.).

CONCLUSION

There is no conflict of decisions and the decisions below are correct. The petition should be denied.

Respectfully submitted.

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SEPTEMBER 1945.